

4DD Holdings, LLC v. USA

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1 APPEARANCES (cont'd.):

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12 ON BEHALF OF THIRD PARTY DEFENDANT (IMMIX):

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1 P R O C E E D I N G S

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3 (Proceedings start mid-sentence, 1:30 p.m.)

4 MR. GILMORE: -- Pat Cipollone and Robert
5 Gilmore.

6 THE COURT: Okay.

7 MR. CIPOLLONE: Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 And for the Government?

10 MR. TODOR: John Todor, Department of Justice,
11 for the United States.

12 THE COURT: Okay.

13 MS. HEISCHMIDT: And Christina Heischmidt for
14 KSJ.

15 THE COURT: All right, thank you.

16 Well, why don't you all stay there since this
17 is not an argument. I assume we can do this back and
18 forth.

19 Mr. Meyers, do you want to sort of give me an
20 update on where things stand?

21 MR. MEYERS: Rob?

22 THE COURT: Oh, I'm sorry. Who do I need to be
23 asking?

24 MR. MEYERS: Mr. Gilmore is going to --

25 THE COURT: All right, that's fine.

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1 MR. MEYERS: Sorry.

2 MR. GILMORE: Would you like me to stand, Your
3 Honor?

4 THE COURT: No, just keep your seat. That's
5 fine.

6 MR. GILMORE: Sure. Thank you, Your Honor.
7 Perhaps since Ms. Heischmidt is here, we can address the
8 KSJ subpoena. I think there we have good news, I
9 believe. Obviously, Ms. Heischmidt can jump in. But
10 we've had exchanges the past couple of days, and as I
11 understand it, KSJ will begin the process of producing
12 documents in response to our subpoena based on a
13 communication from the Government that the Government's
14 position is they can do so for producing documents
15 responsive to our subpoena that are subject to the
16 protective order in our case.

17 And I understand there is an agreement that if
18 KSJ, in doing so, identifies a document that it believes
19 may require additional protection beyond what the
20 protective order provides, that they can raise that
21 document with the Government and the Government will
22 provide a prompt response as to whether that document, if
23 such a document exists, requires some additional
24 treatment.

25 But outside of that, we understand that they

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1 are in the process of beginning to review and produce
2 documents and, hopefully, in the next couple weeks, we'll
3 start receiving the tranche of documents from KSJ.

4 THE COURT: Okay, good. Remind me, there was a
5 motion to quash.

6 MS. HEISCHMIDT: That was dismissed without
7 prejudice, Your Honor.

8 THE COURT: Oh, I already did.

9 MS. HEISCHMIDT: Yes.

10 THE COURT: Who is -- who has the
11 confidentiality concern there? Is that ultimately the
12 Government's concern?

13 MS. HEISCHMIDT: No, Your Honor, that's KSJ --
14 well, in some way, just not necessarily Mr. Todor. Our
15 clients are concerned that the confidentiality clauses of
16 each contract with the different departments and agencies
17 could be breached by disseminating the information.
18 However, I think after a review and discussing with other
19 counsel, my client's fears were assuaged a little bit
20 and --

21 THE COURT: A little bit?

22 MS. HEISCHMIDT: -- under the protective order,
23 they're able to produce, giving notice to the agencies,
24 that is.

25 THE COURT: Who's giving notice of what?

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1 MS. HEISCHMIDT: My client, KSJ, will be giving
2 notice that their -- well, they already have given notice
3 and haven't received any -- you know, any response either
4 way.

5 THE COURT: And so what's the notice? Is it
6 particular to documents?

7 MS. HEISCHMIDT: It's particular that there is
8 an existing subpoena and they sent the subpoena to the
9 contracting officers that were affected by this, just
10 noting that there is the subpoena out there and that they
11 need to produce subject to a certain protective order and
12 to let them know if there was any sort of issue that they
13 foresaw --

14 THE COURT: Mm-hmm.

15 MS. HEISCHMIDT: -- in actually producing those
16 documents based on the contract that they had.

17 THE COURT: Is there a deadline for that?

18 MS. HEISCHMIDT: No, no, Your Honor. It was a
19 few months ago that they sent out that email and have
20 received no response. So they were planning on sending
21 another notice, just letting them know that based on
22 negotiations, they would be ready to produce. So, I can
23 follow up with my clients and certainly say to set a
24 deadline.

25 THE COURT: Well, let's see if we need to.

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1 What's -- Mr. Todor, what's going on with
2 that?

3 MR. TODOR: I haven't received any of the
4 emails that KSJ's counsel was just talking about. What I
5 did do was we were corresponding with Plaintiffs for
6 discovery matters, I sent an email stating that our
7 position was that contractors can comply with their
8 nondisclosure agreements with the Government by producing
9 documents that are responsive to the subpoena and making
10 the confidentiality designations called for by the
11 protective order. We also said --

12 THE COURT: Hang on a second. I'm sorry. Who
13 does that notice go to? I thought you said the agency.

14 MS. HEISCHMIDT: The agencies, yes, Your Honor.

15 THE COURT: We're talking about the agencies
16 that you're representing here?

17 MR. TODOR: I'm counsel for the United States,
18 so I guess I'm everything. But with respect to who we've
19 been dealing with in the case, it's been the Department
20 of Defense, Defense Health Agency has been the agency of
21 the Government that I've been dealing with. I don't know
22 what all agencies KSJ is under contract with or who
23 they're under subcontract with, and I haven't received
24 the emails KSJ's counsel just referred to. But I did say
25 that, you know, it was our position that they could

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1 comply with their obligations with the Government under
2 nondisclosure agreements by making the appropriate
3 designations under the protective order.

4 THE COURT: Okay. So those documents would be
5 produced by you eventually and they're all subject to the
6 protective order. Is that right?

7 MS. HEISCHMIDT: All the documents that are
8 responsive to the subpoena and that would fall under the
9 protective order would be produced and then we would
10 identify -- we don't believe that there are any other
11 ones. However, if we feel that there is something beyond
12 the protective order, we would identify that with both
13 counsel and then amend if needed.

14 THE COURT: All right. So you did not give Mr.
15 Todor the email request that went to the agencies?

16 MS. HEISCHMIDT: I do not believe so. We did
17 send a list of the contracting officers and the different
18 agencies as well as the contracts themselves.

19 THE COURT: Well, go ahead and print out -- or
20 email him another copy of that.

21 MS. HEISCHMIDT: Sure.

22 THE COURT: How do we light a fire under the
23 agencies here? I guess that's to Mr. Todor.

24 MR. TODOR: Okay. Well, I'm -- I was un -- I
25 didn't think that there was any obligation for the agency

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1 to give an affirmative go-ahead once the Court had
2 entered the protective order and, you know, got the
3 position of the Government. Is that the case?

4 THE COURT: How is the email phrased?

5 MR. TODOR: Is that your understanding,
6 Counsel?

7 THE COURT: If we don't hear from you, we're
8 going to supply these on X date?

9 MR. TODOR: Your Honor, I would have to double-
10 check with that. It's been a while since it was sent
11 out. So, unfortunately --

12 THE COURT: Well, if it doesn't say that, then
13 send it again --

14 MS. HEISCHMIDT: Okay.

15 THE COURT: -- and say the Court ordered us to
16 say that if we don't hear from you within a week --

17 MS. HEISCHMIDT: Okay.

18 THE COURT: -- that we're going to furnish
19 these documents.

20 MS. HEISCHMIDT: Will do.

21 THE COURT: All right. Any reason not to do
22 that?

23 MR. TODOR: None from the Government's
24 perspective. We would also clarify that -- as we said in
25 our email, we don't know whether KSJ is dealing with any

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1 security clearance type information under any of their
2 contracts that would require secret or top secret
3 clearance, for example. It was our understanding that
4 the protective order didn't apply to those kinds of
5 documents and those were the kinds of documents that
6 would require the -- if there are any -- if there are any
7 such documents on the part of KSJ.

8 THE COURT: Well, I'm not trying to make more
9 work for you, but I'm kind of surprised that you're not
10 riding herd on that process.

11 MR. TODOR: Well, what we received from KSJ
12 within the past week was an email stating the names of, I
13 think, three or four government contracting officers, and
14 then there were seven other companies for which they're a
15 subcontractor, didn't list who the government contact
16 was, listed a private contact with the -- I guess the
17 prime contractor.

18 So I'm not sure who exactly we would be even in
19 contact with on those. It's my understanding, when I
20 sent the email, that, you know, I said, okay, this is
21 what we think makes it compliant with your nondisclosure
22 agreement with the Government, and at least my
23 understanding from KSJ and 4DD is that they're in
24 agreement with that.

25 THE COURT: Well, you raise a different

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1 question, whether or not who -- who has the interest in
2 making sure that security clearances issues or top secret
3 matters don't go out the door accidentally?

4 MR. TODOR: The Government does.

5 THE COURT: Right. And so that's why I'm a
6 little surprised that the Government hasn't taken a more
7 direct role in trying to figure out what these agencies
8 are being asked to allow. Well, one way or the other, go
9 ahead and send that additional email.

10 MS. HEISCHMIDT: Yes, sir.

11 THE COURT: But make it self-executing, so that
12 if you don't hear back (inaudible).

13 MS. HEISCHMIDT: Okay.

14 THE COURT: And so you're telling me that KSJ
15 would look for such things as things labeled top secret
16 or security clearance or whatever is required?

17 MS. HEISCHMIDT: Yes. Yes, Your Honor.

18 THE COURT: Okay. I'm trying to recall what
19 else was sort of up in the air the last time we met or
20 talked.

21 MR. GILMORE: Well, Your Honor, the number --
22 the question of the number of copies of the TETRA
23 software --

24 THE COURT: Mm-hmm.

25 MR. GILMORE: -- is something that we discussed

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1 on the July 21st telephonic conference call with you, and
2 I know, looking at transcripts from prior hearings, it's
3 obviously something that Your Honor has raised and it's
4 an important issue.

5 THE COURT: Well, hang on -- oh, okay. I
6 didn't raise it on my own. I'm assuming the Plaintiff
7 wants that information.

8 MR. GILMORE: You've asked the parties where
9 are you on that.

10 THE COURT: Right.

11 MR. GILMORE: And you're absolutely right to
12 identify it. It's an important issue. It's something
13 that we've been pushing for and we've pushed further on
14 it and we've asked the Government to give us an answer.
15 And in the interrogatory answers, they have declined to
16 do that. We've said -- well, we're going to proceed to
17 take David Calvin's deposition.

18 THE COURT: Who is he?

19 MR. GILMORE: He is the chief engineer and
20 project manager for the DMIX project. He submitted -- he
21 partially verified the Government's interrogatory
22 responses and then submitted two declarations that
23 purport to supplement or amend the Government's position
24 on the number of installs. We don't think that those
25 declarations are accurate. And so while we've asked for

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1 his deposition -- and I learned this morning we're
2 apparently -- it looks like Mr. Todor is going to be
3 offering him on August 29th, which is good because we
4 need answers from him. But we still think that the
5 Government needs to provide accurate and complete answers
6 to the interrogatories and --

7 THE COURT: To what extent is that going to be
8 disclosed, for lack of a better word, by when Ms.
9 Heischmidt furnishes her material?

10 MR. GILMORE: Well, it's a good question, Your
11 Honor. We're looking at the case schedule and,
12 obviously, in a perfect world, we would have all the
13 documents from everyone before we take depositions of key
14 witnesses. But because we don't feel we have a straight
15 answer, we decided that we need to move forward with Mr.
16 Calvin's deposition now.

17 We have asked the Justice Department to confirm
18 that they've produced all of Mr. Calvin's documents and
19 we haven't gotten that confirmation back. Maybe Mr.
20 Todor can share with us that. In particular, we've
21 identified that there are -- he's produced -- he used his
22 personal email accounts for business, and we see that in
23 some of these documents and we want assurances that all
24 of those personal email accounts' emails that are
25 relevant to this case have been collected and produced --

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1 THE COURT: He's not a 30(b)(6)?

2 MR. GILMORE: We have not noticed him as a
3 30(b)(6). But since he is someone who verified the
4 interrogatory responses and claims direct personal
5 knowledge, we think that -- we need to test the
6 assertions in his declarations.

7 THE COURT: All right, today is the 11th. If
8 you furnish the materials -- are you ready to turn over
9 things, I presume, in one batch or do you have to do this
10 on a rolling basis?

11 MS. HEISCHMIDT: Unfortunately, Your Honor, I
12 think it would be on a rolling basis.

13 THE COURT: Why is that?

14 MS. HEISCHMIDT: So KSJ is not a very large
15 company and so they're -- and also they have never
16 experienced litigation before. And so --

17 THE COURT: It's fun, isn't it?

18 MS. HEISCHMIDT: -- they are -- so I think that
19 they're a little bit overwhelmed, and I have to guide
20 them specifically as to how to do these searches and to
21 pull these items, which they're doing well for, but I
22 think they have to --

23 THE COURT: So the email you sent to the
24 different agencies is generic in the sense that we're
25 about to produce the following types of information?

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1 MS. HEISCHMIDT: It was a copy of the subpoena.
2 It was a blind -- I believe it was a blind sent email
3 saying that if you're on this email essentially, you're a
4 contract that we've identified had certain hits and have
5 information that will be falling under the subpoena that
6 need to be produced. And so --

7 THE COURT: Well, so you don't have --

8 MS. HEISCHMIDT: And, again, I don't remember
9 the --

10 THE COURT: -- in your hand materials that are
11 responsive?

12 MS. HEISCHMIDT: They have hits. That's what I
13 understand. I don't know if they have pulled them. I
14 think they still need to review to confirm that
15 everything is relevant, but that also falls under the
16 protective order. So there's -- I think there's two
17 steps.

18 THE COURT: Well, there's not any problem with
19 your client going through that now, is it?

20 MS. HEISCHMIDT: No. They're starting on that,
21 absolutely.

22 THE COURT: Yeah. Well, my suggestion would be
23 in order to make the August 29th depositions as useful as
24 possible, to try to get as much to the Plaintiff as
25 possible before then.

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1 MS. HEISCHMIDT: Yes, Your Honor.

2 THE COURT: Well, if it turns out -- well,
3 first of all, let's deal with personal emails. Are you
4 satisfied that he's gone through his personal emails?

5 MR. TODOR: Yes, and I emailed Plaintiff's
6 previous counsel on May 3rd that each of the five initial
7 email custodians that Plaintiffs identified, which Mr.
8 Calvin was one, had confirmed that all responsive
9 documents sent to their personal requests -- personal
10 email accounts, if any, have already been produced to DOJ
11 for inclusion in our response to Plaintiff's first
12 request for production of documents.

13 THE COURT: Okay. And remind me what his role
14 was.

15 MR. TODOR: His -- well, he's had a couple
16 different positions. He's currently Director of
17 Standards and Technology for the Department of Defense,
18 Interagency Program Office, from May '13 to March 2015,
19 which was basically the relevant time in the case. He
20 was the program manager for DMIX, chief engineer, and his
21 responsibilities included architecture, security, system
22 development and contractor office representative for the
23 Systems Made Simple, SMS, which is another contractor
24 involved in this case, support contract.

25 THE COURT: Well, I'm just going to assume for

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1 the time being, as you have, too, that you've gotten
2 everything that's responsive. If that turns out not to
3 be the case after the deposition, then redeposing him
4 would be on the Government's nickel.

5 MR. GILMORE: Understood, Your Honor. And I
6 think the one question -- this is a category that comes
7 up often in discovery -- is, as I understand it, the
8 Government is still in the process of putting together
9 its privilege log. But if there are a set of Dave Calvin
10 documents for which they're still in the process of
11 assessing whether they're privileged and those might
12 potentially be depriv'ed and produced, perhaps if the
13 Government can sort of accelerate that and complete that
14 process with respect to him in the next week, so that if
15 we have any, you know, initially privileged documents
16 that the Government, on further review, decided, no, it's
17 not privileged, we're going to produce it, I think those
18 could be, and often are, important documents in cases.
19 So we want to make sure that happens at least before this
20 deposition occurs.

21 THE COURT: When did you first notice his
22 deposition?

23 MR. GILMORE: Well, we noticed his deposition
24 last week for August 23rd. We learned yesterday or --
25 I'm sorry -- Monday, that he wasn't available on the

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1 23rd, and Mr. Todor told me this morning -- this
2 afternoon, right before this hearing, that it's likely
3 that he would be able to sit for a deposition on August
4 29th.

5 THE COURT: So but that was the first effort to
6 negotiate an appearance at a deposition by him?

7 MR. GILMORE: Yes.

8 THE COURT: All right. How likely is it that
9 there are going to be documents that are withheld as
10 privileged?

11 MR. TODOR: Right now, our privilege log --
12 we've completed our initial draft of that and it's in
13 internal review. There were a small number of documents
14 where we were going to produce them with redactions
15 rather than withholding them in their entirety. We'll
16 make every effort to get those to Plaintiffs before Mr.
17 Calvin's deposition.

18 THE COURT: Okay. And then what? What's the
19 next step?

20 MR. GILMORE: Well, we think that the
21 Government should amend its interrogatory responses to
22 address the questions that we've raised before.

23 THE COURT: Well, I'm sorry, you mentioned that
24 earlier. I guess I was assuming that this deposition is
25 going to shed light on whether or not those interrogatory

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1 answers are accurate.

2 MR. GILMORE: That's our intent, Your Honor. I
3 mean, the Government repeatedly seems to be staking its
4 position out that in terms of the counts, the only count
5 that they're willing to identify is the number that it --
6 as the Government claims, were deemed to be overinstalls
7 as part of this true-up process in late 2014 and early
8 2015, which led to a contract modification.

9 But the reason why we filed suit is that we
10 subsequently discovered what we believed was additional
11 project information that showed that there were many more
12 copies than what the Government had indicated during the
13 true-up process. And we've -- prior counsel, and since
14 we've come on, we've discussed with opposing counsel,
15 with the Government, this issue that there are documents
16 that show deletions of TETRA, which is difficult to
17 square with the Government deciding, well, we're going
18 to pay for copies of TETRA, change orders indicating
19 TETRA needs to be removed from these systems. Why would
20 the Government be doing that if the number is known and
21 the Government is paying for it and it's a very small
22 number?

23 We also have learned that the main development
24 testing center, the Richmond DTC, was decommissioned in
25 2015, and we have heard -- we filed suit in August of

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1 2015, 4DD filed suit in August of 2015. Mr. Todor, in
2 our last conversation, indicated all he knows as of now
3 was that that occurred in the summer of 2015. We've
4 actually seen indications that it may have occurred in
5 October of 2015, which obviously would be two months
6 after we filed suit and would raise questions of whether
7 proper evidence preservation measures had been
8 eliminated.

9 All of these issues raise the question of there
10 is evidence that there were more copies than the true-up
11 number and, yet, the Government continues to stick with
12 the true-up number as the only number that it is willing
13 to provide us.

14 When we read Mr. Calvin's second declaration,
15 he discusses the process by which copies of TETRA would
16 be made and moved, but it doesn't appear to us that the
17 Government is willing to investigate and tell us what it
18 thinks the number is. So we're moving forward with this
19 deposition. We will learn, I suspect, a fair amount more
20 about this.

21 And then I think that we may well need to -- we
22 may seek additional relief. We need to figure out what,
23 based on Mr. Calvin's testimony, what the truth is on
24 these numbers and what the Government should be putting
25 in an accurate litigation position statement just in

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1 response to our discovery request.

2 THE COURT: Is the Government's position that
3 the current answers are accurate or that the Plaintiff is
4 not entitled to more information for some legal reason?

5 MR. TODOR: Our position is that our current
6 answers are accurate and the answer we gave them was --
7 they asked how many copies total. Our answer was 232
8 cores, which was the number that was agreed upon and for
9 which 4DD was paid. Its authorized reseller executed a
10 release in this true-up process back in March of 2015.
11 The documents that the Plaintiffs referred to, there were
12 some change orders issued later, starting September 14,
13 which were copies of -- there's one working copy of TETRA
14 in the DTC facility. There are copies of them which were
15 not functional. Those were discussed in the previous
16 status conference. I think the Court referred to them as
17 "partial installs."

18 We gave a declaration from Mr. Calvin May 3rd
19 of this year explaining what was known about them, and
20 that was in agreement with prior Plaintiff's counsel
21 where they were asking for us to amend our
22 interrogatories, and we said, well, we think our
23 interrogatories are correct because you're asking how
24 many installations of the software. We don't think this
25 is an installation of the software. It is a copy,

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1 something that, you know, wasn't itself functional. But
2 here's a declaration. That was, you know, the agreement
3 we had with them. They didn't move to -- for further
4 relief after we did that. Then they got new lawyers.

5 THE COURT: Copies --

6 MR. TODOR: But we gave them the information we
7 had.

8 THE COURT: Hold on a second. How do you treat
9 copies? I'm not sure what you mean by "copies."

10 MR. TODOR: Okay. So the explanation was, you
11 know, Mr. Calvin's declaration which, you know, he's the
12 tech person so I don't want to misrepresent, but, you
13 know, they'll have every opportunity to explore that at
14 the deposition. There was one working copy of TETRA in
15 the DTC -- the government contracting facility. It's not
16 simply a matter of copying the software because it has to
17 be installed, has to have certain permissions, has to tie
18 with other data in order for it to be usable. There was
19 only one copy that got to that point.

20 Some engineers there made copies of that one
21 working copy, but they didn't do the work that it would
22 take to install it. As Mr. Calvin explains in the
23 deposition, the DTC was a contracted facility with
24 several different projects going on. So something that
25 would be installed at one point wouldn't necessarily

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1 be -- you can't just copy it over and have it work
2 because you have to tie to other parts of the computer
3 system in order for it to work. Those were the ones that
4 were the subject of the change order saying, okay, delete
5 those, we're stopping this iteration of the health record
6 project, and those were the change orders in September of
7 2014.

8 Plaintiff's previous counsel said, we think
9 these are inconsistent with your interrogatory responses.
10 We furnished Mr. Calvin's declaration explaining those
11 there for you to explore those and whether they're
12 inconsistent with --

13 THE COURT: Well, where do the 232 fit in?

14 MR. TODOR: Okay. So there were -- the initial
15 license was -- the Government licensed to purchase 64
16 process -- installations of TETRA, 64 processor cores.
17 After the decision was made to go to a different approach
18 on the health records system, my understanding is 4DD
19 came and said we think there are additional installations
20 of this. There was a process where 4DD submitted their
21 information on how many installations they think there
22 were based on information from the government contracting
23 facility, the DTC in Richmond, and SMS's facility, which
24 wasn't under government control.

25 They sat down basically in a room, 4DD's

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1 representative, SMS's representative and the government
2 contracting officer's representative. 4DD had a list of
3 how many installations they thought there were; SMS had a
4 list, talked it over. They agreed on a figure of 232.
5 The 232 represents an agreed number of 64 because that's
6 what we paid for in Richmond. It wasn't the product of
7 being able to go and get -- look at specific records from
8 that, in part because of DoD's cybersecurity
9 restrictions. They don't -- when the software is on a
10 computer, sometimes it will ping back to the original
11 place to get a license key or to tell them that the
12 software is working. Because of DoD security
13 regulations, they didn't do that; they couldn't do
14 that.

15 So there was an agreement that we were going to
16 pay for the 64 and there were an additional 168 licenses
17 which were identified -- or 168 instances agreed upon in
18 SMS's environment that that's the total of 232. At
19 \$10,000 per instance, we agreed to pay \$1.7 million for
20 those additional, and that was signed by both sides and,
21 I believe, paid in May of -- March of 2015.

22 THE COURT: You said there was one working
23 copy.

24 MR. TODOR: Yes.

25 THE COURT: Now, how does that square with the

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1 64 that you paid for initially?

2 MR. TODOR: Well, it would be less than 64.

3 Mr. Calvin says in his declaration that, to his
4 knowledge, it was never more than that. But the one
5 working copy was achieved on the basis of testing work to
6 come up with one working copy. So it may be as few as
7 one, but we agreed to pay for 64.

8 THE COURT: And, ultimately, 232.

9 MR. TODOR: Sixty-four through the DTC Richmond
10 facility is what we paid for, and then there are an
11 additional 168 identified in SMS which wasn't under
12 direct government control, they were under -- you know,
13 they were a contractor, and we paid for the SMS 168 on
14 top of the 64 we had already paid for for Richmond.

15 THE COURT: All right. Does it matter whether
16 or not any of those are nonfunctional or partial
17 installations?

18 MR. TODOR: Well, I think that's the core of
19 the -- I'm guessing that's the core of the dispute
20 between Plaintiffs and us as to whether the subsequent
21 change orders make our interrogatory responses
22 inaccurate. We think they don't because they were not
23 functioning installations. Plaintiffs appear to have a
24 different view. Again, we've disclosed the documentation
25 we have on the subsequent change orders, and those are

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1 discussed in Mr. Calvin's May 3rd declaration.

2 THE COURT: Well, what was the -- what was the
3 purpose behind those change orders?

4 MR. TODOR: To have them deleted from DTC
5 Richmond.

6 THE COURT: And the "them" is part of the 232
7 or some other universe?

8 MR. TODOR: These would be ones that were
9 not -- well, these were not discussed as part of the
10 true-up process. Now, to the extent that there was --
11 assume there's only one working copy, I think there are
12 29 lines listed on the one change order. It could be a
13 matter of legal interpretation whether one -- you know,
14 the 29 would be still under 64, but these were not
15 discussed as part of the true-up process because -- the
16 true-up process because of the difficulty in accessing
17 the actual records for the DTC Richmond. It was just
18 agreed upon that 64 was the figure for Richmond. So
19 these additional copies of the one working copy were not
20 actively discussed at the time.

21 THE COURT: I'm not sure I understand all that.
22 I didn't hear anything about a waiver or a release.

23 MR. TODOR: There was a release in the true-up.

24 THE COURT: And does it extend beyond the 232?

25 MR. TODOR: Well, it extends to, you know, the

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1 entire subject matter of the dispute that they've raised
2 and we -- you know, we're considering whether we're, you
3 know, ultimately going to move for a summary judgment
4 based on accord and satisfaction after discovery on the
5 basis of that. The release was signed by 4DD's
6 authorized reseller, IMMIX, which is a nominal third
7 party in the case.

8 MR. GILMORE: And, Your Honor, from our
9 position, it's not a release. It's a contract
10 modification, but it's not a release. And as I think Mr.
11 Todor just admitted, the copies that are referenced in
12 this are -- Calvin's second declaration -- weren't
13 discussed, meaning they weren't disclosed to 4DD. 4DD
14 didn't have access to the DTC.

15 And I think Mr. Todor was explaining, normally,
16 it's -- software has like a ping-back or a phone home
17 function that sends a message back to 4DD, hey, someone's
18 trying to copy your software. That had to be turned off
19 according to the Government for cybersecurity reasons.
20 So our client is in the dark as to what was being done in
21 terms of the copies that were being made. And that's
22 what we're -- that's what we're trying to get at now.

23 We know the number that was dinged because
24 that's the number that the Government told us. This is
25 what we think the number is and this is what we're

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1 willing to pay and we signed a contract modification for
2 it, but we didn't know about the additional copies. We
3 learned about that discovery once we see these documents.
4 And we're asking for a count. It seems undisputed that
5 there are more copies of this software. I mean, you can
6 (inaudible) qualifiers that the Government wants to. But
7 we want a number. What is the number of copies that were
8 made? Whether configured, partially installed, once
9 installed --

10 THE COURT: Well, hang on a second.

11 MR. GILMORE: -- uninstalled, deleted.

12 THE COURT: Do you have agreement as to -- have
13 you defined that term "copy" to include nonfunctional
14 partial installs?

15 MR. GILMORE: I believe that it is defined that
16 way adequately in the interrogatory responses and if --

17 THE COURT: Well, hang on.

18 MR. GILMORE: Sure.

19 THE COURT: Did you understand the question to
20 include nonfunctional partial installs?

21 MR. TODOR: No, we understand that the question
22 was installations and we had a -- they had a very broad
23 definition of what would be defined as an installation.
24 Our interrogatory response had, you know, objections to
25 that as not being consistent with contractor usage. But

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1 it was explained what it was and what we weren't
2 answering. And then we provided the additional
3 declaration from Mr. Calvin specifically addressing
4 these, you know, partial installations, whatever you
5 would call them, on May 3rd.

6 THE COURT: So, did he -- did he give a number
7 for those?

8 MR. TODOR: Not in terms of the number of
9 processor cores because that data wasn't there. We give
10 -- we gave the records with the change orders that listed
11 the numbers of -- whatever you call them -- copies,
12 whether -- how many processor cores each of those
13 represented. I don't know that the documents actually
14 stated that. But we gave all the information that we had
15 on them.

16 THE COURT: Why did it take -- what did you say
17 -- five change orders to delete all these attempted
18 copies?

19 MR. TODOR: We think -- well, from what I was
20 told by the client, at least two of the orders were
21 redundant. So one identified only 29; one, I think,
22 identified another one. The rest, we think, were just,
23 you know, okay, delete them all just in case. But our
24 understanding is that that's all the ones that we knew
25 of.

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1 THE COURT: And so you're saying -- I don't
2 have the change order in front of me obviously. You're
3 saying the change order was specific to the number of
4 expected deletions?

5 MR. TODOR: There were certain -- I believe
6 they said, basically, delete anything, but here are the
7 ones we know about.

8 THE COURT: And so by location, by person, by
9 desk, by --

10 MR. TODOR: By file -- there's a file list
11 descriptor that had like 29 entries, I believe.

12 THE COURT: Are they on a central server?

13 MR. TODOR: There were -- on the DTC servers in
14 Richmond were the ones that were on those change orders.

15 THE COURT: Why would it take multiple copies
16 on a single server?

17 MR. TODOR: Well, my understanding was that
18 they would -- the copies -- the one working copy, because
19 they were doing testing and installation, so they were
20 testing how it would work configured one way, testing how
21 it might work if configured another way.

22 THE COURT: When you say "nonfunctional," what
23 do these systems lack to make them functional?

24 MR. TODOR: Mr. Calvin discusses that in his
25 declaration. Generally, there are permissions that are

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1 required in the installation of a software. One is
2 called ports, where you have to have access to other
3 parts of the -- I guess the network in order for things
4 to work. Another is this process of resources. Another
5 is what kind of databases it would tie into.

6 So this is to work with health records. So
7 what kind of records would it be able -- would it be
8 configured to tie into? Different health record
9 configurations might work differently. I don't know all
10 of the technical details, but those are the kinds of
11 things that he discusses in his declaration.

12 THE COURT: You're not talking about
13 permissions coming from the Plaintiff for these --

14 MR. TODOR: No, computer permissions. So
15 technical permissions within -- the DoD server has
16 restrictions on what information a program is allowed to
17 access.

18 THE COURT: So if one of these nonfunctional
19 partial installations had, in fact, been -- received the
20 necessary permissions, that would have been added to the
21 232?

22 MR. TODOR: Well, I guess my answer would be
23 these -- they learned of these -- well, these were only
24 discussed -- these were not discussed as part of the 232.
25 If they -- if it came to the point where it becomes a

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1 full install, it would be the kind of thing that would
2 count against one of our 64, yes.

3 But there wasn't -- my understanding was these
4 were not looked at in the context of are these going to
5 count against the 64 because these weren't considered to
6 be actual installations and it was kind of a separate
7 process from the true-up process.

8 MR. GILMORE: And, Your Honor, the separate
9 process is deleting a bunch of copies of our client's
10 software that the Government didn't tell us existed. I
11 mean, that's -- Mr. Todor is dressing that up, but that's
12 what he's describing, and the documents support that. I
13 mean, there's numerous documents where Mr. Calvin says,
14 delete copies of this from the various environments, and
15 that is after our client raised their hand and said,
16 look, from the limited information we have, it looks like
17 you may have exceeded your license. And that prompts a
18 whirlwind of activity between the Government and the
19 contractors that leads to a furious effort to delete all
20 of these copies of TETRA that they have in this test
21 environment and --

22 THE COURT: Well, hang on a second.

23 MR. GILMORE: -- presumably have been operating
24 for quite some time.

25 THE COURT: We're outside the SMS world here

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1 for these nonfunctional partial installs?

2 MR. GILMORE: Yeah, this is -- we're talking
3 about just the DTC right now.

4 THE COURT: Okay.

5 MR. GILMORE: We're not even talking about the
6 SMS lab, which is a separate issue.

7 THE COURT: All right. Mr. Todor says, well,
8 if we have figured out how to make them functional and
9 fully installed, that would have -- we would have gotten
10 -- you'd have to have a credit for paying one of the 64,
11 right? Do you understand what his point was there?

12 MR. GILMORE: Well --

13 THE COURT: In other words, they had paid for
14 64 installs, hadn't used them. So if we had a functional
15 fully installed one, we've already paid for 64 of them.

16 MR. GILMORE: I'm not sure that we agreed that
17 they paid for but didn't use 64 installs. In other
18 words, it sounds like he's saying we have a credit for 64
19 installs.

20 THE COURT: Right.

21 MR. GILMORE: We don't agree to that as an
22 accurate characterization of what occurred here, in
23 particular because there wasn't information -- this
24 information. I mean, Mr. Todor just admitted that it
25 wasn't discussed that, well, we have all these copies and

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1 maybe they haven't been configured yet or activated yet
2 that were deleted. None of that was discussed with our
3 client about that. And so --

4 THE COURT: Are you satisfied that -- well,
5 first of all, the affidavit, or plural, that Calvin
6 wrote, do they attempt to quantify this different
7 universe?

8 MR. GILMORE: They do not. They don't attempt
9 to quantify the universe of what we've just been
10 discussing, these copies that were in the environment
11 that were maybe not configured yet or maybe partially
12 configured, but were deleted, all of which occurred prior
13 to the contract modification being entered into and none
14 of which was discussed or disclosed to us.

15 THE COURT: All right. Is there any reason
16 Calvin can't quantify these that were the subject of the
17 change orders?

18 MR. TODOR: Well, I guess the -- a limitation
19 on that would be he had -- we have the change orders that
20 were disclosed in discovery, you know, and discussed with
21 Plaintiff's counsel. Those have lists of, you know, what
22 was not. I'd rather them have just said, you know,
23 delete everything just to make sure. I don't know that
24 we have any information on the number of those beyond
25 what is expressed in those change orders.

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1 So if the question is is there an ability to
2 say definitively how many of these other partial installs
3 there were and how many processor cores they were on, I
4 would say -- we would certainly, you know, ask Calvin,
5 but at least from what I understand, the ability to do
6 that might be limited by the fact that all we really have
7 are these change orders that may or may not have every
8 bit of information on the number of processor cores that
9 would be responding the way the Plaintiffs phrased their
10 interrogatory in the case.

11 THE COURT: Well, I assume the interrogatory
12 asks for a number.

13 MR. GILMORE: It does, yes, of installs,
14 uninstalls, reinstalls. I think it's broad enough so
15 that we're talking about copies of the software even if
16 it's configured or nonconfigured.

17 THE COURT: Well, was that question put to Mr.
18 Calvin?

19 MR. TODOR: I believe he verified that
20 response.

21 THE COURT: And I thought there wasn't a
22 number.

23 MR. TODOR: So the number was 232 all told,
24 which was the number from the true-up process, and then
25 the -- these partial installs were not part of the 232

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1 because the interpretation was these are not installs,
2 uninstalls or reinstalls.

3 THE COURT: Well, the Plaintiff is --

4 MR. TODOR: But he did give a separate
5 declaration discussing, you know, what he knows about
6 those.

7 THE COURT: Well, if he knows the numbers of
8 the nonfunctional partial installs or other copies other
9 than this true-up, I want him to furnish that before the
10 deposition.

11 MR. TODOR: Understood.

12 THE COURT: Well, is that sufficient for now?

13 MR. GILMORE: On this topic, I believe it is,
14 Your Honor.

15 THE COURT: All right. What other topics?

16 MR. GILMORE: There is an additional issue
17 which we've requested from the Government. We were --
18 it's clear that the Government obviously is working very
19 closely with us in this, I think the main contractor at
20 issue in this case. And we've looked at the Government's
21 contract with SMS and it gives the Government ownership
22 over SMS's work product essentially.

23 So we asked the Government to -- whether the
24 Government had requested that SMS furnish to the
25 Government any of the documents that the Government had a

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1 contractual right to and that would be responsive to our
2 discovery request. And we've had several discussions
3 with Mr. Todor, we cited some cases to Mr. Todor that
4 hold the -- I think the well-established proposition that
5 if you have a contractual legal right to documents that
6 are in the physical possession of a third party, of a
7 nonparty, but you have a practical or legal ability to
8 obtain them, then you have possession, custody and
9 control over those documents. And if they're responsive,
10 they need to be produced in response to party discovery.

11 So we identified that issue to Mr. Todor, and
12 the response that we received from the Government is,
13 well, the Government thinks the contract has expired or
14 expired prior to the -- to the discovery requests being
15 served in this case and so, therefore, the Government
16 doesn't have a right to ask. We look at the contract and
17 the contract ownership -- the ownership doesn't say it's
18 a license, it doesn't say it terminates at the end of the
19 contract. It says the Government owns the work. The
20 Government shall have unlimited rights under this
21 agreement to all information and materials furnished by
22 the contractor performing work under the resulting
23 (inaudible).

24 So we think that there are unquestionably
25 documents that the Government needs to produce and --

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1 through the normal party discovery process regardless of
2 whether they are sitting physically right now with SMS.

3 THE COURT: Do we need a motion to compel on
4 this?

5 MR. TODOR: Well, we don't think so because we
6 don't think there's reason to.

7 THE COURT: All right, well --

8 MR. TODOR: Just for context, the contracts
9 expired, I've been informed by agency counsel, September
10 28, 2015. The complaint in this case was filed August
11 28th, 2015. The first discovery requests in this case
12 were filed May 9th, 2016.

13 THE COURT: Well, that begs the question that
14 counsel was posing, whether or not the obligation goes
15 beyond the expiration date of the contract.

16 THE COURT: Agency counsel said their
17 understanding of the contract is it doesn't and we
18 wouldn't have the right to make SMS do the extra work --

19 THE COURT: Have you read the contract?

20 MR. TODOR: -- when they're not under contract
21 with us.

22 THE COURT: Have you read the contract?

23 MR. TODOR: I looked at that provision. I
24 don't recall the exact language.

25 THE COURT: All right, I -- I'm not going to

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1 rule on it now if you're going to oppose it, but -- I
2 want to see a copy of the contract. Put it in a formal
3 motion to compel and attach it.

4 MR. GILMORE: And we suspected that's what we
5 would need to do. We were hoping perhaps the Government
6 would revisit its position today.

7 MR. TODOR: To clarify, Your Honor, this -- SMS
8 was the party that was here at the previous status
9 conference in court where 4DD had filed a motion to
10 compel SMS to produce documents pursuant to their
11 subpoena. SMS produced the documents that they thought
12 were responsive limited to the authorization and consent
13 issue that the Court said was the subject of this phase
14 of discovery. SMS moved to compel; the Court denied the
15 motion.

16 The Government, when we made our --

17 THE COURT: SMS moved --

18 MR. TODOR: Mm-hmm.

19 THE COURT: -- SMS moved to compel?

20 MR. TODOR: 4DD moved to compel SMS.

21 THE COURT: Right.

22 MR. TODOR: SMS --

23 THE COURT: Why did I deny the motion?

24 MR. GILMORE: Your Honor, as we read the
25 transcript -- and we weren't at the hearing at that point

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1 -- we hadn't entered our appearance yet -- but as we read
2 the transcript, SMS counsel seemed to indicate, look, we
3 have many more project documents than what we're
4 producing, but we only -- it seemed we only are
5 producing, I think it's a couple hundred documents that
6 go to the authorization and consent issue.

7 Now, the Government hasn't bifurcated
8 discovery.

9 THE COURT: Well, hang on. So SMS said
10 everything that related to authorization and consent
11 we've turned over?

12 MR. GILMORE: That is their -- that was their
13 argument. And I think Your Honor said, well, if there's
14 nothing that they have, there's nothing more to compel.

15 THE COURT: Right.

16 MR. GILMORE: From our perspective, though --

17 THE COURT: No, I understand this is a
18 different question.

19 MR. GILMORE: It is. And I would make this
20 point, the Government hasn't bifurcated. Nor have we.
21 The parties haven't bifurcated the discovery.

22 THE COURT: No, I understand. Just go ahead
23 and make your motion to compel and attach whatever
24 documents I need to see.

25 MR. GILMORE: We'll do that.

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1 THE COURT: Okay. What else?

2 MR. GILMORE: We have some other issues in
3 terms of third parties. We're working through having
4 discussion prior to the hearing and hopefully we can
5 reach a resolution with the Government. There's another
6 contractor called ICS Nett, who has produced a number of
7 important documents. They also had government-issued
8 laptops that are government property and contained
9 documents about a number of government projects,
10 including this one, but others as well. ISC.net couldn't
11 even unlock the laptops without the Government.

12 We're trying to work through a process where --
13 and the Government has sent a proposal. We sent a
14 counterproposal, and the Government objected to ours.
15 We're trying to work through it. I hope that we can. We
16 think that the Government, since they're government
17 laptops, needs to take more responsibility in terms of
18 obtaining the documents off these laptops and producing
19 them to us. I take it that the Government sees things
20 differently. I'd like to think we can reach a resolution
21 and we'll try and do that in the near future.

22 THE COURT: Who actually has physical control
23 of these computers -- I mean, possession?

24 MR. GILMORE: I believe they're still at ICS
25 Nett, although we've been contemplating either having the

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1 laptops shipped to the Defense Health Agency IT folks or
2 perhaps having the Defense Health Agency IT folks come to
3 ICS Nett's offices.

4 THE COURT: So they're not currently being
5 used?

6 MR. TODOR: Actually, our understanding is they
7 are currently being used, but on a different project.

8 THE COURT: Mm-hmm.

9 MR. TODOR: So the same personnel is issued a
10 laptop and apparently they kept using the same laptop
11 that they were issued when they were working on the
12 contract at issue in this case. Now they're working on a
13 different project for DHA. So they still have the same
14 laptop. That's kind of our concern is that there's going
15 to be information on those laptops not related to the
16 contracts at issue in this case.

17 So we're trying to work through with Plaintiffs
18 a procedure where ICS Nett would identify what's
19 responsive. There's, you know, like I said, a technical
20 impediment because of DoD security to where they can't
21 just copy the data themselves. We were willing to work
22 with them on doing that.

23 What we are not trying to do --

24 THE COURT: Hang on. What is it you want to
25 know from ICS?

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1 MR. GILMORE: In terms of the responsive
2 documents? I mean, what --

3 THE COURT: What have you asked ICS to produce?

4 MR. GILMORE: I think the project documents, I
5 mean, largely related to TETRA and use of TETRA and
6 interaction with 4DD. I think that's the scope of the
7 subpoena to ICS Nett. And ICS Nett has produced a large
8 volume of documents and they had some really important
9 documents, some of which have led to questions that we've
10 posed to the Government about the number of copies of
11 TETRA. We actually got documents fro ICS Nett before we
12 got the Government's documents.

13 But we have this remaining set of, well, we
14 also -- ICS Nett said, we also have these laptops, we
15 think they were used on the project, we think that they
16 likely have additional responsive documents to your
17 subpoena about TETRA and 4DD and the project -- the IMMIX
18 project. So what we -- it's the Government's laptops.
19 We can't even access them.

20 From our perspective, I think we're just trying
21 to accelerate things by saying, look, why don't the
22 parties to the suit be the ones that take responsibility
23 for this since it's the Government's property anyway.
24 These are government computers being used for government
25 contracts, not just the project here.

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1 So that's why we're telling -- our position we
2 conveyed to Mr. Todor is, this whole back and forth of
3 you do part of it and send it back to ICS Nett, why can't
4 the Government just take ownership since it owns these
5 computers and just produce the documents itself. And Mr.
6 Todor has resisted that and --

7 THE COURT: Well, if they're in use, I assume
8 it wouldn't be the easiest thing in the world just to
9 take it away from somebody. But I will just take it at
10 face value that you're trying to figure out a way to
11 access those computers that would be responsive to the
12 Plaintiff's discovery request.

13 MR. TODOR: And our -- the approach we
14 suggested is DHA could issue the same personnel a new
15 laptop so they could image what they had and, you know,
16 give them a new one, and then we would -- so they could
17 continue work, you know, under their new contracts.

18 THE COURT: Mm-hmm.

19 MR. TODOR: So the people can keep doing work.
20 The issue really becomes how the contents of the laptops
21 that are going to be in use are going to be worked over
22 to determine what's responsive and what confidentiality
23 applies to the documents that are responsive to the
24 subpoenas with the knowledge that these contain
25 information from contracts unrelated. So we don't know

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1 how --

2 THE COURT: You're not talking about --

3 MR. TODOR: -- ICS keeps their data.

4 THE COURT: You're not talking about what
5 they're currently being used for but when they were
6 originally being used for whatever work is relevant
7 here --

8 MR. TODOR: Right.

9 THE COURT: -- they had information that
10 Plaintiff wouldn't be entitled to access.

11 MR. TODOR: Well, what they -- okay, so my
12 understanding is what they were originally working on is
13 the kind of thing Plaintiffs would be entitled to.

14 THE COURT: All of it?

15 MR. TODOR: Or at least what was -- what
16 pertained to the work on this contract that would be
17 within the scope of their subpoena. Then there would be
18 information from -- after, you know, they stopped working
19 on this, that would be unrelated, that they wouldn't be
20 entitled to.

21 THE COURT: Why can't they just be pulled off
22 of there or vice versa? I mean, I assume the Plaintiff
23 doesn't care whether it gets the existing computers minus
24 whatever is subsequent or vice versa. But I just don't
25 want this thing hanging out in limbo.

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1 MR. TODOR: Right. We proposed a procedure
2 where ICS Nett identifies what's responsive and then, you
3 know, we would copy it and we'd produce it to the
4 Plaintiffs. Plaintiffs proposed a procedure where the
5 Government searches the laptops to try to find what's
6 responsive off of them and the Government reviews it for
7 responsiveness, the Government reviews it for
8 confidentiality and then produces that to Plaintiffs.

9 Plaintiffs issued a subpoena to ICS Nett. It's
10 ICS Nett's, you know, responsibility to comply with that
11 subpoena. So we don't think it's appropriate for the
12 Government to be determining, you know, information which
13 is being kept by ICS Nett in ways ICS Nett chooses,
14 whether that is responsive to their subpoena and what
15 isn't.

16 THE COURT: Well, I assume, if I had to rule on
17 it, I would say that it would be sufficient for ICS Nett
18 to be the one doing the responding. But what I heard at
19 the beginning of this was that ICS didn't feel the
20 liberty go onto these computers because they're
21 government property. That piece of it has to be
22 eliminated.

23 MR. TODOR: And that's what we proposed to do
24 in terms of the technical procedure was --

25 THE COURT: Mm-hmm.

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1 MR. TODOR: -- we were on a call with
2 Plaintiff's counsel and ICS Nett's, I believe, director
3 of operations. The conversation was, well, we don't have
4 -- ICS Nett's person says, well, we don't have basically
5 administrative privileges on these laptops that would let
6 us copy the contents because DoD locked it down.

7 THE COURT: And has that problem been solved?

8 MR. TODOR: So that's what we would -- that's
9 what we'd propose to solve by the procedure we propose
10 where, you know, DoD would do the copying of the actual
11 data. The work of determining, once we do that, what's
12 responsive, that seems to be the conversation we're
13 having with Plaintiffs.

14 MR. GILMORE: And the reason why we thought
15 that our position and our proposal was better is because
16 the Government is going to be reviewing these documents
17 anyway as it has done with the other third party subpoena
18 productions to assess the confidentiality assertion that
19 the Government intimated that we made. And so we said,
20 look, if these are government laptops that you, the
21 government itself, is required to access because the
22 contractor who has temporary use of them can't, and the
23 Government's going to be copying and then the Government
24 is going to be looking at the documents anyway, let's
25 just streamline this. Why can't the Government do soup

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1 to nuts here rather than this complicated back and forth
2 with ICS Nett? That was our proposal, Your Honor. I
3 didn't think it was unreasonable.

4 THE COURT: And that's unreasonable because?

5 MR. TODOR: Well, we don't think we should be
6 in the position of having to determine what is and isn't
7 responsive as a first cut out of ICS's information,
8 particularly with the knowledge that there is information
9 on those that doesn't apply to the contract at issue in
10 this case. So, you know, we would be in the position of
11 reviewing who knows how much information is on, I think,
12 12 laptops, most of which is -- you know, much of which
13 is going to be nonresponsive. That should be ICS's
14 responsibility since they're the party that got the
15 subpoena, not us.

16 THE COURT: Well, we'll try the Government's
17 approach initially. I think ICS is probably going to be
18 in a better position to do the segregating initially. I
19 don't buy the argument that the Government can't do it if
20 it comes to that. But for the time being, since the
21 subpoena is to ICS and since they're probably going to be
22 in a better position to segregate things, we'll go that
23 route.

24 MR. GILMORE: Understood, Your Honor.

25 THE COURT: What else?

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1 MR. GILMORE: I think that is it from our
2 perspective, Your Honor. We have requested dates for
3 depositions of additional government witnesses in the
4 September to early October time frame, beyond Mr. Calvin,
5 and we're waiting to hear back from the Government on
6 that.

7 We've also requested that the Government
8 produce five additional custodians' emails pursuant to
9 the ESI protocol, and as I understand it, the Government
10 is in the process of doing that. So we -- hopefully,
11 that will happen quickly.

12 THE COURT: Okay.

13 MR. GILMORE: So we're trying to push forward
14 on all fronts.

15 THE COURT: Remind me, is there any law on the
16 subject of whether or not a license would be triggered by
17 an unsuccessful effort to copy or an incomplete effort?

18 MR. GILMORE: Well, I think that -- as I
19 understand it -- I don't know the answer to that. I'll
20 be -- I'm not sure that's the question. Because as I
21 understand it, I don't think that it's an unsuccessful
22 effort to copy. I think that copies of the software were
23 made. It's just a question of whether they were
24 configured or activated. So I think the analogy -- the
25 way we've been thinking about it -- and I'm not a

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1 computer expert -- but it seems to me if you make a copy
2 of the book but you don't read it -- read the copy, have
3 you still made -- if it's unauthorized, isn't that still
4 copyright infringement? And we would say yes.

5 So I think that may be a little bit too
6 simplistic, but that's kind of how we're thinking of it.
7 So I don't think that it's a question of, well, if you
8 only made a copy of half a book or a fragment of a book,
9 it's -- they made a whole copy of a book. It's just a
10 question of did anyone open it and start reading it or
11 read a few pages but not read the whole thing.

12 THE COURT: Okay.

13 MR. GILMORE: I think if you make a copy of the
14 book, regardless of whether you read the whole thing or
15 not, and you didn't have -- you violate the copyright.
16 And I think that's what we're talking about here.

17 Now, the Government may disagree and I think
18 part of this is we're trying to understand the number of
19 copies here. But from our perspective, that's how we
20 view the question of copies.

21 THE COURT: So the -- as things currently
22 stand, the target is this group of potential
23 installations that Mr. Calvin alluded to in his
24 affidavits that are the subject of these deletion change
25 orders?

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1 MR. GILMORE: I think there are two buckets. I
2 think there is the copies of TETRA that were in the
3 Government's DTC and then there's the --

4 THE COURT: Well, I thought that had been paid
5 for.

6 MR. GILMORE: Well, that's what we're talking
7 about here because there were these -- the discussions we
8 were having were about additional copies, not disclosed
9 to 4DD, that were deleted and, as I understand Mr. Todor
10 describing Mr. Calvin's declaration, well, those were not
11 configured or not used or something different so they
12 don't count.

13 THE COURT: Oh, okay. Well, I guess that was
14 my first bucket. So what's the second bucket?

15 MR. GILMORE: So the second bucket is copies in
16 the SMS lab. And as I -- as we understand it, that's the
17 subject of the Government's motion to dismiss on the
18 authorization and consent. I don't believe there's a
19 dispute from the Government that copies in the
20 Government's DTC --

21 THE COURT: Do we know how many were in SMS or
22 have we talked about that at all today?

23 MR. GILMORE: No, I don't think we've talked
24 about that and I think that is a separate issue. I think
25 that certainly that gets to the documents that we're

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1 trying to get from SMS.

2 THE COURT: Okay.

3 MR. GILMORE: But we intend, obviously, to
4 pursue that through depositions of SMS, as well as
5 government witnesses involved with interfacing with SMS
6 and the SMS lab environment.

7 THE COURT: And so what have you kicked up, if
8 anything, on the authorization and/or consent?

9 MR. GILMORE: Well, from our perspective, I
10 think that that is something that we -- we certainly see
11 a number of instances where the Government was fully
12 informed and working side by side with SMS about what was
13 going on in the SMS lab environment. And we -- it
14 appears that SMS is trying to argue that they didn't know
15 that they needed to pay for the copies they were using in
16 the lab environment, and we strongly dispute that. The
17 contract we had with SMS was clear. So we've certainly
18 found documents that the Government has produced and that
19 evidence the Government's knowledge and participation of
20 what was going on in the SMS lab.

21 THE COURT: Do you have a separate suit against
22 SMS?

23 MR. GILMORE: No, we do not have a separate
24 suit that we've filed against SMS.

25 THE COURT: I mean, are they still in business?

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1 MR. GILMORE: Oh, very much. SMS originally
2 was bought by Lockheed Martin and then was sold as a part
3 of Lockheed Martin selling a large portion of its
4 business to Leidos, a major contracting -- government
5 contractor. So SMS is now a -- as I understand, a
6 subsidiary of Leidos.

7 THE COURT: Okay. That's all I needed to find
8 out for now.

9 Government, anything else?

10 MS. TODOR: No.

11 THE COURT: Sufficient? Okay, thank you both.
12 We're adjourned.

13 MR. GILMORE: Thank you, Your Honor.

14 MR. TODOR: Thank you.

15 (Whereupon, at 2:31 p.m., the hearing was
16 adjourned.)

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S/Elizabeth M. Farrell

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